No. [redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1906.

In the Matter of the Estate

—OF—

HIKAALANI HOBRON NOHOLOA, Deceased.

ON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR APPELLANT.

HONOLULU:
HAWAIIAN GAZETTE CO., LTD.
1906

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

IN THE MATTER OF THE ESTATE OF HIKAALANI HOBRON NOHOLOA, DECEASED.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

Hikaalani Hobron Noholoa, a leper, residing at Kalaupapa, Island of Molokai, Territory of Hawaii, died on or about the 29th day of June, A. D. 1906, leaving certain personal property at the leper settlement, that is, at Kalaupapa, (this being a name under which the leper settlement is very often spoken of,) and certain real and personal property on the Island of Oahu.

Her heirs-at-law are her husband, David Noholoa, and a niece, Kaimiola Nakookoo Gray, the appellant, both of whom are lepers, residing on the Island of Molokai. Upon the decease of Mrs. Noholoa, there was offered by one Enoch Johnson to the judge of the circuit court of the second circuit, a will written in the Hawaiian language purporting to be the last will and testament of the deceased, and a petition was regularly made that letters testamentary issue to him. At the same time, the niece, appellant herein, applied for letters of administration upon the property of the deceased subject to administra-

tion, situate on the Island of Oahu, upon the ground that the same was not subject to the will and that, as to such property, the deceased died intestate. The petitions were heard on the same day in the circuit court of the second circuit; the proceedings in the matter of the will being made a part of the proceedings in the petition for letters of administration. The will was admitted to probate and Enoch Johnson appointed administrator-with-the-will-annexed under a bond of one thousand dollars.

The petition for letters of administration was denied. An appeal was taken to the Supreme Court of the Territory of Hawaii by Kaimiola Nakookoo Gray, and in that court the decision of the circuit judge, denying the petition, was affirmed. A petition for re-hearing was duly filed; and the petition denied, the Chief Justice dissenting. Thereupon, this appeal was taken and perfected.

At the hearing in the circuit court on the petition for probate of the will, a translation thereof was made in part by the Honorable A. N. Kepoikai, judge of the second circuit court, which translation is as follows:

"I, the undersigned, a leper residing at Kalaupapa, Island of Molokai, Territory of Hawaii, do make this my last will for all property known belonging to me and appearing in my name situate at Kalaupapa aforesaid, with good will (or intention,) do hereby bequeath the same as hereinafter described: One gray horse, one bay mare; one black mare; one frame wooden house and other houses owned by me, as well as all other property owned by me, to my husband David Noholoa, residing at Kalaupapa aforesaid, to him and to his heirs, administrators and executors forever. Renouncing all claims that my relatives may set up in law to this." (24).

It was this translation that was used on appeal to the

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Supreme Court of the territory and which that court declared to be "evidently defective."

The vital question involved in this case is the intention of the testatrix in making said will. It is contended by the appellant that the will disposed of only such personal property belonging to the testatrix as she had at the leper settlement at the time of her death; and, on the other hand, it was contended by Mr. Enoch Johnson that by the words "as well as all other property owned by me" the testatrix meant to devise and bequeath her real and personal property situate on the Island of Oahu; the personal property being of about the value of five hundred dollars, and the real estate being valued at from ten thousand to thirty thousand dollars. (58).

SPECIFICATION OF ERRORS.

The appellant relies upon all the specifications of errors set forth in the assignment of errors filed herein, to wit:

First: The Supreme Court of the Territory of Hawaii erred in deciding said case upon a translation of the will in question which was "evidently defective."

Second: The Supreme Court of the Territory of Hawaii erred in holding and deciding that the words translated "also all the other property known to be mine" were not modified by the words translated "situate at Kalaupapa aforesaid."

Third: The Supreme Court of the Territory of Hawaii erred in adopting the word "property" as a translation of the words "na waiwai" instead of adopting the words "chattels" or "effects" as the English equivalent of the said words.

Fourth: The Supreme Court of the Territory of Hawaii erred in holding and deciding that the words of the will translated "also all the other property known to be mine," showed the intention of the testatrix to dispose of her Honolulu property.

FIFTH: The Supreme Court of the Territory of Hawaii erred in holding that the will in question passed property situate elsewhere than at Kalaupapa and failed to consider the situation of the testatrix at the time of making the will, and especially failed to consider that she was living at the leper settlement at Kalaupapa, a government institution.

SIXTH: The Supreme Court of the Territory of Hawaii erred in holding and deciding that the rule ejusdem generis does not apply in the construction of the said will.

SEVENTH: The Supreme Court of the Territory of Hawaii erred in denying the motion for rehearing in said cause. (63 & 64).

BRIEF OF ARGUMENT.

FIRST: *The Supreme Court of the Territory of Hawaii erred in deciding said case upon a translation of the will in question, which was "evidently defective."* (28).

As pointed out above, the will was written in the Hawaiian language. It was drawn by a layman, J. K. Waiamau, (20), assi-tant superintendent of the leper settlement. It was signed Mrs. David Noholoa, her mark, and witnessed by Fannie H. Babcock and by said J. K. Waiamau.

The Justices of the Territorial Supreme Court, when this matter was decided, were more or less familiar with the Hawaiian language, and had sufficient knowledge thereof to see that the translation in question was defective; and it is contended that the Territorial Supreme Court erred in deciding property rights of great value upon an "evidently defective" translation of the will. Had a correct translation been made, it would have clearly appeared that the will in question bequeathed only the personal property at Kalaupapa, and did not refer to property on the Island of Oahu.

SECOND: *The Supreme Court of the Territory of Hawaii erred in holding and deciding that the words translated "also all the other property known to be mine," were not modified by the words translated "situate at Kalaupapa aforesaid."* (28).

It is elementary that in a question concerning the construction of wills, the intention of the testator is the guiding consideration and that this intention will always prevail unless it is against some positive rule of law.

RULES OF CONSTRUCTION GENERALLY.

"The first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law."

Smith v. Bell, 6 Pet. 68.
Lambert v. Paine, 3 Cranch 97.

"The intent of the testator is the cardinal rule in the construction of wills; and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail, although in giving effect to it some words should be rejected, or so restrained in their application as to change the literal meaning of the particular sentence."

Finlay v. King, 3 Pet. 346.

"The construction of a will is governed by the intention of the testator, when not inconsistent with the rules of law."

Colton v. Colton, 127 U. S. 300.

"A court is authorized to put itself in the position occupied by a testator, in order, in view of the circumstances then existing, to discover from that standpoint what the testator intended by his will."

Lee v. Simpson, 134 U. S. 572.

"There is no principle of law more generally admitted than that the intention of the testator should be carried out if the same can be gathered from the contents of the instrument."

Harrison v. Judd, 3 Haw. 421.

"The intention of the testator as indicated in the will must prevail, unless it is in violation of some rule of law. A will is therefore to be construed so that all its parts, when considered in relation to each other, shall form a consistent whole."

Zupplein v. Austin, 6 Haw. 8, 1867.

"The intention of the testator should govern in the construction of wills."

Thurston v. Allen, 8 Haw. 392.

Whatever may be the defects in the translation of the will adopted by the Supreme Court of the Territory, even that translation shows that the will *refers* to property at Kalaupapa, for the defective translation reads as follows:

"I, the undersigned, a leper residing at Kalaupapa, Island of Molokai, Territory of Hawaii, do make this my last will for all property known belonging to me and appearing in my name situate at Kalaupapa aforesaid, * * *." (28).

After the Supreme Court of the Territory had decided this case on a defective translation of the will, Messrs. Magoon and Lightfoot were retained to petition the Supreme Court for a rehearing in part upon the ground that the translation adopted by the Supreme Court was defective and those attorneys procured affidavits of several persons, learned in the Hawaiian language and customs and attached these affidavits to their petition for a rehearing.

AFFIDAVITS RE TRANSLATION.

Mr. Fred W. Beckley, one of the official Hawaiian inter-

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preters in the circuit court of the first circuit, translates this part of the will as follows:

"I, the undersigned, a leper, residing at Kalaupapa, Island of Molokai, Territory of Hawaii, do make this my last will concerning all the chattels known to be mine and in my name situate at Kalaupapa aforesaid, * * *." (33).

Mr. Beckley further says that "it is plain from the Hawaiian version that Mrs. David Nohoiea, a leper, disposes of all her personal property of whatever nature situate at Kalaupapa, Molokai, Territory of Hawaii, to her husband, David Nohoiea, * * *." (34).

Mr. C. L. Hopkins, another official Hawaiian interpreter of the circuit court of the first circuit, translates this portion of the will as follows:

"I, whose name is subscribed below, a leper residing at Kalaupapa, Island of Molokai, Territory of Hawaii, do make this as my last will concerning all property known to be mine and in my name situate at Kalaupapa, mentioned above, * * *." (36).

Mrs. Emma Nakuina, a lady of great learning in the Hawaiian language and customs who was a commissioner of private ways and water rights, and who in the execution of her duties as commissioner had frequent occasion to examine documents written in the Hawaiian language, and who for many years had made a study of the Hawaiian people, their manners and customs, (38), translates this portion of the will as follows:

"I, the undersigned, a leper living at Kalaupapa, Island of Molokai, Territory of Hawaii, I hereby make this * * * last will and testament concerning all properties (goods) known to be mine and in my name that are situated (laying) in Kalaupapa as shown above; * * *." (38).

Mr. J. S. Emerson, a gentleman born and raised in the Hawaiian Islands, and who is now sixty-three years of age, who has lived there practically all his life, and who has made a study of the Hawaiian manners and customs, (42), translates this portion of the will as follows:

"I, the undersigned, a leper, living at Kalaupapa, Island of Molokai, Territory of Hawaii, do make this my last will, with regard to all the goods or property known to be mine or held in my name situate at the above mentioned Kalaupapa, * * *." (43).

Mr. Emerson further says that "etimologically, grammatically and idiomatically the language used in this will describes property situate at Kalaupapa and that this property is personal property, as distinguished from lands * * *." (44).

Mr. Henry Smith, who for twenty-five years has been clerk in the judiciary department of the Hawaiian Islands, and who is the custodian of all wills probated in each and every judicial circuit court of the Territory, and who, during the time aforesaid, has copied and read a great many wills written in the Hawaiian language devising and bequeathing lands and personal property, and is very familiar with Hawaiian expressions in wills disposing of real and personal property (46), says:

"That affiant has read and studied the will of Mrs. David Nohoioa filed in the above entitled cause and unhesitatingly states that it disposes of personal property only and all of such property is situate at Kalaupapa." (47).

The Reverend H. H. Parker, who for many years has been and still is the pastor of an Hawaiian church, preaching to an Hawaiian congregation in the Hawaiian language, (47), translates this portion of the will as follows:

"I, the undersigned, a leper residing at Kalaupapa, Island of Molokai, Territory of Hawaii, make this my last testament

concerning all chattels known as mine and in my possession, being in Kalaupapa aforementioned; * * *." (48).

THE TESTIMONY OF A WITNESS TO THE WILL.

Mrs. Fannie Babcock, one of the witnesses to the will, in answer to interrogatories propounded to her deposed as follows:

Q. "Are you a witness to her will?" (Q. 7, p. 14.)

A. "I witnessed a will made at Kalaupapa conveying her personal property only." (A. to Q. 7, p. 18.)

Q. "Did Mrs. David Noholoa alias Hikaalani Noholoa sign the Will in your presence, and in the presence of J. K. Waiamau?" (Q. 21, p. 14.)

A. "I know her intention was to leave all her property in the settlement to D. Noholoa. Whether she signed her name or made X I don't remember." (A. to Q. 21, p. 18.)

THE SIGNIFICATION OF THE HAWAIIAN WORD "NO."

Much light is thrown upon the intention of the testatrix by her use of the word "no," in the clause at present under discussion. She says, "* * * do make this my last will '*no*' my chattels * * * situate at Kalaupapa." This word "no" is the equivalent of the Latin "de."

Andrews, the author of the Hawaiian-English dictionary says "no" is the equivalent to the preposition *of; for; belonging to; concerning.* In the translation adopted by the Supreme Court of the Territory, the word "for" is used as the English equivalent of "no," so that the faulty translation is made to read "do make this my last will *for* all property, etc." If the word "concerning" be used as the equivalent of "no" the sentence would then have some meaning. "I do make this my last will *concerning* all property known belonging to me and appearing in my name situate at Kalaupapa aforesaid." It was

concerning the property at Kalaupapa that the will was made and not concerning anything else.

By adopting the word "concerning" as the equivalent of "no" it is perfectly clear that the will was made pursuant to the regulation of the Board of Health, referred to hereafter under the fifth heading. (p. 24 post.)

Mr. Beckley adopts this word. He translates the sentence, * * * "do make this my last will *concerning* all the chattels known to be mine and in my name situate at Kalaupapa aforesaid, * * *." (33).

Mr. Hopkins adopts the same word and translates the sentence as follows: * * * "do make this my last will *concerning* all property known to be mine and in my name situate at Kalaupapa, mentioned above, * * *." (36).

Mrs. Nakuina adopts the same word and translates the sentence as follows: "* * * I hereby make this my last will and testament *concerning* all properties (goods) known to be mine and in my name that are situated (laying) in Kalaupapa as shown above, * * *." (38).

Mr. J. S. Emerson uses the words "with regard to" as the equivalent of "no" and translates the sentence as follows: * * * "do make this my last will, *with regard to* all the goods or property known to be mine or held in my name situate at the above mentioned Kalaupapa, * * *." (43).

The Reverend H. H. Parkker uses the word "concerning" and translates the sentence, "* * * make this my last testament *concerning* all chattels known as mine and in my possession, being in Kalaupapa aforementioned; * * *." (48)

It is evident therefore that the testatrix had in mind when she executed the will, only her property situated at Kalaupapa aforesaid.

THE WORDS TRANSLATED "DO HEREBY BEQUEATH THE SAME AS HEREINAFTER DESCRIBED."

The words in the original will translated, "the same," are "ia mau pono apau."

"Ia" is the demonstrative pronoun, "these."

"Mau" is the sign of the plural, and is the synonym of "na."

"Apau" corresponds to the English adjective "all."

The word "pono" is translated as follows:

By MR. BECKLEY: "said effects." (33).

By MR. HOPKINS: "those effects." (36).

By MRS. NAKUINA: "properties." (38).

By MR. J. S. EMERSON: "effects." (43).

MR. BECKLEY says of this word, "Though the word 'waiwai' may be used to mean estate or property, real or personal, or both, it is thus evident that only personal property situate at Kalaupapa was to be disposed of. This is borne out by the words 'ke hooili nei au ia mau *pono* apau o'u.' * * * 'Pono' in this sense qualifies the words 'na waiwai' and limits them to personal effects or movable goods." (34).

MR. J. S. EMERSON says, "The ideas expressed by 'na waiwai apau' in the 3rd line is later repeated in the 5th line in the expression 'ia mau pono apau.' This word *pono* cannot be used to include real estate. If therefore the testatrix limits her devise in the 5th line to pono, (goods, personal property), it is evident that when describing her devise in the 3rd line she does not intend it to convey land." (44).

Here then we have two words, "na waiwai" and "mau pono" both in the plural, which those learned in the Hawaiian language, manners and customs, unhesitatingly say refer to chattels or effects and not to lands.

THE WORDS TRANSLATED "AS HEREINAFTER DESCRIBED."

The words translated "as hereinafter described" in the translation adopted by the Supreme Court, are "ia malalo penei." They are translated as follows:

By Mr. Beckley: "as set forth below." (33).

By Mr. Hopkins: "as described below." (36).

By J. S. Emerson: "as set forth below." (43).

So that, after the use of words conveying the idea of chattels, goods or effects, the testatrix makes her meaning clearer by stating "as those effects are hereinafter described," and then goes on to say, viz., certain horses, certain houses, together with all other of her property, meaning of course thereby, the effects at Kalaupapa described above as "na waiwai," "mau pono."

THE FAILURE TO USE WORDS SIGNIFICANT OF REAL ESTATE.

It is a significant fact that the testatrix failed to use any word to signify real estate, or any word indicating where the real estate was situated. The affidavit of Mr. Henry Smith is very important in this record.

"That he is Hawaiian born and for about twenty-five years has been clerk in the Judiciary Department of the Hawaiian Islands."

"That affiant is the custodian of all wills probated in each and every Judicial Circuit of the Territory."

"That during the time aforesaid, affiant has copied and read a great many wills written in the Hawaiian language, devising and bequeathing lands and personal property, and is very familiar with Hawaiian expressions in wills disposing of real and personal property."

"That during all the time aforesaid, affiant has not copied or read any will devising realty or lands referring to them as 'waiwai' but that in all wills copied or read by affiant, the word

'waiwaipaa,' 'aina' or some word expressing fixed property has been used to devise real estate." (46, 47).

In this connection Mr. Fred Beckley says, "The word 'waiwai' if intended to dispose of real property is very seldom, if ever, used without qualifying words such as 'paa' (real), 'apana aina' (parcel of land, etc.)" (34).

Mr. Hopkins notices the fact that the testatrix does not use the word "paa" (immovable).

Mr. J. S. Emerson says, "If the testatrix had intended to dispose of real property, she would in all probability have made use of some such expressions as 'ko'u waiwaipaa' (my real estate), 'ko'u aina' (my land), 'ko'u kuleana' (my kuleana), 'ko'u pa hale' (my house lot), 'ko'u mau loi' (my taro patches), as the Hawaiians are very particular and specific in such matters." (44).

It may seem strange that the Hawaiians are particular in the use of such expressions, but this is readily to be accounted for by the fact that when the early missionaries first visited the islands, (in 1824), they found a virgin field in the Hawaiian language as far as legal expressions were concerned, for the very good reason that private property in land was unknown, and no laws existed except those hidden in the mind of this or that chief.

The American missionaries were all men of great intelligence. They started the Hawaiians right in the use of legal terms, and the Hawaiians have retained the lessons they received.

THE POSITION OF THE WORDS "AS WELL AS ALL OTHER PROPERTY OWNED BY ME," IN THE WILL.

It is important to notice in this connection that the words relied upon by Mr. Enoch Johnson, to wit, "as well as all other property owned by me," is in the same sentence with the words above discussed. Taking even the defective translation adopted

by the Supreme Court, and observing the punctuation thereof, it will be seen that the will contains but two sentences: (1) Beginning with "I, the undersigned," and ending at "forever." (2) Beginning with "Renouncing" and ending with "this."

If the words "as well as all other property owned by me," had been in a separate sentence, cut off from the sentence introduced by the words "concerning all chattels belonging to me," etc., there might have been some ground for supposing that property on the Island of Oahu was thereby devised and bequeathed, but it is contended that it is perfectly clear that the words "as well as all other property owned by me," forming as they do a part of the same sentence introduced by the words "concerning all chattels belonging to me and appearing in my name situate at Kalaupapa aforesaid," are intended to bequeath such things as household furniture, cooking utensils, wearing apparel, books, pictures, etc., which the husband of the testatrix had been accustomed to use in common with her, and which the testatrix desired should continue to be used by him.

THE WORDS USED IN THE SECOND SENTENCE.

The words translated "renouncing all claims that my relatives may set up in law to this" are also significant. The following translations are given by the experts:

MR. BECKLEY: My heirs shall not have any right to claim these at law." (33).

MR. HOPKINS: "That my family shall have no right to claim this at law." (36).

MRS. NAKUINA: "And my relatives will have no right by law to claim these (chattels being understood)." (39).

MR. J. S. EMERSON: "Moreover my relatives have no right of property in these things by which they can claim them by law." (43).

These words most certainly signify a desire on the part of

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the testatrix that the other members of her family shall not make any claim to the things at Kalaupapa and they alone are devised in the will. They seem to say to us:

"My husband and I have enjoyed these things together and after my death, I do not wish my relatives to make any claim to them, but I do wish that my husband shall have peaceable and quiet possession thereof."

THE PARTICULAR DESCRIPTION OF THE PERSONAL PROPERTY.

Upon the question of the intention of the testatrix in using the words translated "as well as all other property owned by me," it is proper to notice that she describes the personal property with great particularity. It was "a *buck-skin* horse," and a "*bay* mare," and a "*black* mare." It is hardly conceivable that she should describe these things of comparatively small value with such particularity, and then devise her real estate situate on the Island of Oahu, worth from ten thousand to thirty thousand dollars under this general description, especially where the words are found in the same sentence bequeathing all her chattels at Kalaupapa.

THIRD: *The Supreme Court of the Territory of Hawaii erred in adopting the word "property" as a translation of the words "na waiwai," instead of adopting the words "chattels" or "effects" as the English equivalent of the said words.*

The translation adopted by the Territorial Supreme Court is in part as follows:

"I, the undersigned, * * * do make this my last will *for all property* * * * situate at Kalaupapa, aforesaid." The words "for all property" are adopted as the English equivalent of the words "no na waiwai." The word "no" has been discussed in the preceding section of this brief. The word "waiwai" is a curious one. "Wai" means water, the great

source of wealth to the early Hawaiians. This word is found in combination with other words, for instance, "kanawai" means a law, primarily, a rule of property in water. Lunakanawai, means a judge, that is to say, an overseer of the property rights primarily in water. The word "waiwai," is defined by Andrews in the Hawaiian Dictionary as follows:

"Waiwai, s. Goods; property; that which is possessed or owned; property in distinction from money or cash;"

The word "*na*" is a sign of the plural. Andrews defines this word as follows:

"*Na*" Article. Standing before nouns represents the plural number; as, *ke alii*, the chief; *na alii*, chiefs or the chiefs. "Na" often answers the double purpose of a plural article (that is, a plural for all the other articles which are singular), and the sign of the plural number to the noun. As an article it is both definite and indefinite.

Our contention is that the word "waiwai," used in conjunction with this plural sign "na," shows clearly that the testatrix had in mind by the use of these words her chattels, goods or effects situate at Kalaupapa aforesaid, and she had not in mind real property or property of any kind, except that situate at the leper settlement.

A correct understanding of these words, "*no na waiwai*," especially in conjunction with the words translated "situate at Kalaupapa aforesaid" shows beyond question that the Supreme Court of the Territory was led into grave error by adopting the defective translation upon which its decision is based. A perusal of the affidavits made by those learned in the Hawaiian language and people and their manners and customs will show the importance of a correct understanding of these words.

Mr. Fred W. Beckley says, "In line 3 of the original will referring to the property to be disposed of in the following clause 'na waiwai apau i ike ia no'u a ma ko'u inoa e waiho ana

ma Kalaupapa' (all properties known to be mine and in my name situate at Kalaupapa). In the translated copy affiant has used the terms 'chattels' instead of the word 'properties,' because 'na waiwai apau' (all the properties) is used in the plural sense, the word 'na' giving the idea of plurality before 'waiwai' (goods or property) shows that the meaning was limited to chattels or personal property and was not intended to mean land or real estate. Though the word 'waiwai' may be used to mean estate or property, real or personal, or both, it is thus evident that only personal property situate at Kalaupapa was to be disposed of. This is borne out by the words 'ke hooili nei au ia mau pono apau o'u' in line 5, (I hereby bequeath all of said effects of mine). 'Pono' in this sense qualifies the words 'na waiwai' and limits them to personal effects or moveable goods. The word 'waiwai' if intended to dispose of real property is very seldom, if ever, used without qualifying words such as 'paa' (real), 'apana aina' (parcel of land, etc.). In line 11 of the original, affiant has again used the words 'chattels' for 'na waiwai' for reasons already given. In line 14 in place of 'ohana' (relatives), affiant has used the word 'heirs,' for the reason that although a person may be a relative and still not an heir, in this document the testatrix bars out all relatives from any claim to the property disposed of in the will. It is therefore evident that the word 'ohana' in Hawaiian was intended to be limited to such relatives as would be her heirs at law. If any additional reason was required to show that the testatrix intended only to dispose of chattels at Kalaupapa and that the will did not refer to chattels in any other place nor to land, it is well known that the land at Kalaupapa belongs to the government and that the settlement at that place is a public institution. It is plain therefore, that the testatrix could not have intended to dispose of land at Kalaupapa and as she only had personal effects there which she could dispose of only to persons

at the settlement, it is fair to presume that she had in mind those personal effects which she wished should go to her husband, assuming that all of her property outside of the settlement would go to her heirs at law." (34).

Mr. Hopkins translates these words "concerning all property known to be mine," and says,

"In the devising clause in this will the testatrix used the words 'ke hooili nei au ia mau pono apau o'u i olelo ia' (I do bequeath all of those effects of mine aforesaid). This clause refers to the declaratory part of her will 'no na waiwai apau i ike ia no'u a ma ko'u inoa' (all effects and property known to be mine and in my name) more particularly set out by her as to the nature thereof in the following words: 'e like me keia i hoakaka ia malalo penei,' (in accordance to those as described below). This clearly shows that the testatrix was disposing all personal property in the declaratory part of her will without any words of qualification as 'lewa' (moveable) 'paa' (immoveable); still the nature of the property disposed of by her is made certain by the use of the words 'mau pono apau' (all those effects) taken in conjunction with the schedule mentioned in the will. It is important to note that the testatrix makes use of the words 'a me na waiwai e ae a pau i ike ia no'u' (all other goods (property) known to be mine). These words being used in conjunction with the schedule of personal property bequeathed could have no other significance than that there were other personal effects at Kalaupapa which the testatrix owned but had not enumerated in the will for she being possessor of houses would ordinarily have furniture, cooking utensils, etc., which should go with the houses as a matter of course for the benefit of her husband, her beneficiary, and in fulfilment of her declaration 'manao maikai' (just intention) towards her husband. The testatrix makes her intention very clear as to the location of the property to be disposed of by the words 'no na

waiwai apau i ike ia no'u a ma ko'u inoa e *waiho ana ma Kalaupapa'* (concerning all property known to be mine and in my name *situate at Kalaupapa)* so that the words 'a me na waiwai e ae apau i ike ia no'u' (and all other goods known to be mine) could only mean such as the testatrix possessed and owned in Kalaupapa and at no other place, and as to these things the testatrix admonished her family or heirs that they shall have no rights or claim in them at law." (36, 37).

Mrs. Nakuina translates the words "concerning all properties (goods)" and says, "That by no translation of this will conveying the meaning of the testatrix as expressed in Hawaiian, can real estate be included in the property disposed of, nor can any property be included outside of that situate or lying at Kalaupapa." (39).

Mr. J. M. Poepoe says in this regard, "That while the word 'waiwai' may include both real and personal property, the Hawaiian expressions used in this will permit of only one interpretation, that is, that the property disposed of in the will is personal property situate at Kalaupapa and at no other place." (40).

Dr. N. B. Emerson says in this connection, "The word 'waiwai' is capable of bearing the meaning 'real estate' but as used by the testatrix in the third and eleventh lines and under the limitations imposed upon it by her, this word means personal property. And under the like limitations it is limited to her personal property at Kalaupapa, Island of Molokai. If she had intended to have the instrument apply to property that she might have owned elsewhere, she would have named the place or would have used some phrase indicating a broader application of the will." (42).

Mr. J. S. Emerson, perhaps one of the most learned Hawaiian scholars in the world, translates the words in question, "with

regard to all the goods or property," and thus discusses the words in question:

"That etimologically, grammatically and idiomatically the language used in this will describes property situate at Kalaupapa and that this property is personal property, as distinguished from lands for the reason that,

"(1) Though the word 'waiwai' appearing in the third line of the will is a word which is capable of including all kinds of property, whether chattels or real estate, it is in this connection limited to the idea of chattels only because it is restricted by the phrase 'e waiho ana ma Kalaupapa' and under this restriction it will be seen that only personal property is referred to.

"(2) The ideas expressed by 'na waiwai apau' in the 3rd line is later repeated in the 5th line in the expression 'ia mau pono apau.' This word *pono* cannot be used to include real estate. If therefore the testatrix limits her devise in the 5th line to pono, (goods, personal property), it is evident that when describing her devise in the 3rd line she does not intend it to convey land.

"(3) The words 'na waiwai' are restricted by the phrase in the 6th line 'e like me keia i hooakaka ia malalo penei' (according as set forth below, to-wit), plainly indicating that all the property intended to be disposed of was situated at Kalaupapa.

"(4) The property specifically described is personal property. There is nothing to show that the testatrix intended to include real property, or to suggest the possibility of including in the expression 'a me na waiwai e ae apau i ike ia no'u' in the tenth and eleventh lines any property outside of her personal property at Kalaupapa.

"(5) If the testatrix had intended to dispose of real property, she would in all probability have made use of some such expressions as 'ko'u waiwaipaa' (my real estate), 'ko'u aina' (my land), 'ko'u kuleana' (my kuleana), 'ko'u pa hale' (my house lot), 'ko'u mau loi' (my taro patches), as the Hawaiians are very particular and specific in such matters.

"(6) There can be no doubt that the horses and one wooden house disposed of were at Kalaupapa. It was a wooden house not a brick house attached to the soil. 'Na hale e ae' (and other houses) in the tenth line were probably the out-houses, but whether out-houses or not, they were at Kalaupapa and at no other place.

"(7) The words 'na waiwai' in the tenth and eleventh lines constitute the same phrase as in the third line and were undoubtedly used to describe the same property and the words 'situate at Kalaupapa' must follow by implication the phrase 'a me na waiwai e ae apau i ike ia no'u' in the tenth and eleventh lines.

"(8) At the end of the will is this significant sentence 'aole hoi he kuleana o ko'u mau ohana e koi mai ai i keia mau ke kanawai' (moreover my relatives have no right of property in these things by which they can claim them at law,) that is, the things, the personal property situate at Kalaupapa which she gives to her husband and which her relatives are not to claim (as distsinguished from real estate or any other form of property not at Kalaupapa) the implication being that such other property is to go to her heirs.

"(9) The words 'a me na wa[illegible]i e ae apau' in the tenth and eleventh lines constitute a phr[illegible]e contained in the sentence describing the property situate at Kalaupapa. Had it been her intention to devise all her property a new sentence would have been required or else she should have employed some word or

phrase to show that the phrase 'situate at Kalaupapa' was not intended to limit the words 'ame na waiwai e ae apau.' No such words appear and it is plain that the phrase 'all other property belonging to me' refers to all other personal property at Kalaupapa, and was intended to apply to only such personal effects as omitted from the schedule, such as furniture, bric-a-brac, etc., in her house, and which she had enjoyed together with her husband; these things she desired him to continue to enjoy after her death.

"(10) Familiarity with Hawaiian method of expression and Hawaiian ideas would almost make it imperative to construe the words 'na waiwai' as used in the will to mean chattels. It is hardly possible that a Hawaiian would intend to dispose by will of all real as well as personal property and enumerate certain chattels and not specifically refer to his lands, especially if the lands were of great value.

"(11) To read a devise of real estate into this will makes it ambiguous, whereas if the will does not devise real estate it is plain. It would be foolish for the testatrix to specifically describe personal property situate at Kalaupapa and then dispose of all her property wherever situated. Had she intended to dispose of all property other than personal property at Kalaupapa, she would have left out all mention of the specific things and made use of some such expression as 'ko'u waiwai apau loa ma na wahi apau e wailio ana' (all my property wherever situated) or 'ko'u waiwai apau loa, ko'u waiwai lewa ame ko'u waiwai paa' (all my property both real and personal), leaving out all reference to the property which she owned located at Kalaupapa.

"(12) The word 'loa' is a very expressive word in Hawaiian and while the use of this word in addition to the word 'apau' in line 11 would not make any difference in the grammatical construction yet its omission is a slight indication that the testatrix did not have in mind that all of her property should be affected by the will." (44, 45, 46).

FOURTH: *The Supreme Court of the Territory of Hawaii erred in holding and deciding that words of the will translated "also all the other property known to be mine," showed the intention of the testatrix to dispose of her Honolulu property.*

This assignment of error goes to the foundation of the whole question, it has been covered in part by the first, second and third headings of this brief.

The word used for property in this phrase is the same as that used in the introductory part of the will to wit, "waiwai."

The phrase is thus translated:

MR. BECKLEY: "And all other chattels known to be mine." (33).

MR. HOPKINS: "And all other property known to be mine." (36).

MRS. NAKUINA: "And any other goods (chattels) known to be mine." (39).

MR. J. S. EMERSON: "Together with all the goods or property known to be mine." (43).

MR. HOPKINS says, "It is important to note that the testatrix makes use of the words 'a me na waiwai e ae a pau i ike ia no'u' (all other goods (property' known to be mine). These words being used in conjunction with the schedule of personal property bequeathed could have no other significance than that there were other personal effects at Kalaupapa which the testatrix owned but had not enumerated in the will for she being possessor of houses would ordinarily have furniture, cooking utensils, etc., which should go with the houses as a matter of course for the benefit of her husband, her beneficiary, and in fulfilment of her declaration (manao maikai) just intention towards her husband." (37).

MR. J. M. POEPOE says, "That while the word 'waiwai' may include both real and personal property, the Hawaiian

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expressions used in this will permit of only one interpretation, that is, that the property disposed of in the will is personal property situate at Kalaupapa and at no other place."

Mr. J. S. Emerson says, "The words 'na waiwai' in the tenth and eleventh lines constitute the same phrase as in the third line and were undoubtedly used to describe the same property and the words 'situate at Kalaupapa' must follow by implication the phrase 'a me na waiwai e ae apau i ike ia no'u' in the tenth and eleventh lines."

Fifth: *The Supreme Court of the Territory of Hawaii erred in holding that the will in question passed property situate elsewhere than at Kalaupapa and failed to consider the situation of the testatrix at the time of making the will and especially failed to consider that she was living at the leper settlement at Kalaupapa, a Government institution.*

It is elementary that in arriving at the intention of a testator, his circumstances, surroundings and conditions at the time of the making of the will can be considered for the purpose of explaining any latent ambiguity.

"In regard to a will of personalty, in an especial manner, the law of the place of the testator's domicil governs the distribution thereof, and will govern in the interpretation of wills thereof, unless it is manifest that the testator had the laws of some other country in view."

Harrison v. Nixon, 9 Pet. 483.

"The validity of devises, as against the heirs at law, depends upon the law of the State where the lands lie; and the validity of bequests, as against the next of kin, upon the law of the testator's domicil."

Jones v. Habersham, 107 U. S. 174.

"No rule is better settled than that the whole will is to be taken together, and is to be so construed as to give effect, if it be possible, to the whole."

Smith v. Bell, 6 Pet. 68.

Robinson v. Adams, 4 Dall. Appx. XII (Ct. Er. & App. Del.).

"In the construction of ambiguous expressions, the situation of the parties may very properly be taken into view."

Smith v. Bell, 6 Pet. 68.

"In the construction of wills, the law does not decide upon conjectures, but upon plain, reasonable, and certain expressions of intention, found on the face of the will."

Wright v. Page, 10 Wheat 204.

"A general intent is of weight in determining what was intended by particular devises or bequests."

Given v. Hilton, 95 U. S. 591.

The unfortunate inmates of the leper settlement are provided by the Board of Health with all the necessaries of life, including a small sum of money which they can save or spend as they see fit. It is possible perhaps for them to save a little of this money, and there is no reason why they should not receive gifts and presents from their more fortunate friends and relatives in the outside world. It is as true today as it was in the days of Jesus that a leper is considered unclean. He is shunned by his fellowmen. Everything he touches is supposed to be contaminated with the dreadful disease.

Personal property once at the settlement is there forever. It can never be taken away and used by others not afflicted with the disease. Among the Hawaiians this dread of infection is perhaps not as keenly felt as among the other races, and if it were possible to have the effects of a deceased leper sent to his

relatives or friends, these effects would in all probability be used without being first subjected to disinfection. Even to this day letters written by the unfortunates to their friends must be disinfected before they can be sent to the outside world. It is doubtless for the purpose of preventing the spread of the disease, that the Board of Health has formulated rules with regard to the property of the deceased lepers. The rules are set forth in the petition for rehearing as follows:

"Section Eight: Lepers are permitted to build houses for their own use and to select building sites subject to the approval of the superintendent of the settlement; provided however, that if at any time the Board of Health desires any such land for any purpose, the Board shall have the right to remove any house thereon to another site. All expenses of moving shall be borne by the Board, and the Board shall pay to the owner of the house all actual damage caused him by reason of such removing."

"Section Nine: They may sell or give away or devise by will such houses, but only for the use and occupation of other lepers, and with the knowledge and approval of the Board of Health."

"Section Eleven: Property left by lepers who have died without leaving a will, and who have no legal heirs at the settlement, will be sold at public auction, and the proceeds, after deducting the lawful expenses will be remitted to the president of the Board of Health, for the benefit of the legal heirs of the deceased, and if after due advertisement in an English and Hawaiian newspaper no lawful claimant shall appear, such proceeds, after deducting the expense of advertising, shall be turned over into the public treasury as Government Realizations."

"Section Twelve: Lepers may leave their personal property and effects at the settlement by will, but only by a written will,

signed in the presence of not less than two witnesses, one of whom shall be the superintendent of the leper settlement, or other officer authorized by the superintendent."

The will in question was, by virtue of Section 12, witnessed by the assistant superintendent of the leper settlement and by another patient, Mrs. Babcock. It is lacking in the words of solemnity usually found in wills. The customary "In the Name of God, Amen," is not seen, and it may be for this reason among others that those versed in the manners and customs of the Hawaiians have stated under oath that this will bequeathes only personal property at the leper settlement.

We respectfully contend that a majority of the Justices of the Territorial Supreme Court were in error in overlooking this important fact. It is true that it was not adverted to in the briefs filed in the first place in said court, but on the petition for re-hearing the rules of the settlement were brought to the attention of the court. These rules and this feature received no consideration from a majority of the justices. The case was submitted on motion for re-hearing after the hour of noon and decided within two hours thereafter, the chief justice dissenting. There being no counter affidavits, the affidavits filed by the appellant must be taken as true, and forces the court to hold that the will is limited to chattels at Kalaupapa.

We contend that had this feature of the case been carefully considered, it would have appeared abundantly clear that the will was one provided for by the rule (Section 12) above referred to.

SIXTH: *The Supreme Court of the Territory of Hawaii erred in holding and deciding that the rule "ejusdem generis" does not apply in the construction of this will.*

The Territorial Supreme Court held in its decision that to apply this rule to the will in question, would be an application

The 11th clause also associated "all property, money and effects" and as the other disposes of what had been omitted, this disposes of such as had been specified and given to the widow, which remained at her death. The words are evidently used in the same sense in both paragraphs, and bear an obvious relation to each other. Unless the testator intended to limit the significance and scope of the expression as used in both clauses, why should he have added the qualifying words "that may be left at her decease," in the latter? Manifestly, as land is not subject to a contingency, since it *must*, not *may be*, left, when the life estate expires, he intended such goods as might be destroyed or consumed by the preceding owner, but in fact are not, but remain for the bequest in remainder to operate upon.

Williams v. Parker, 84 N. C. 90.

No better argument could be employed to illustrate this point than that employed in *Andrews v. Schoppe*, 24 Atl. 807. In this case, the testator commences the description of the property which it was her intention to dispose of by this clause, with the use of the general term, "all my housekeeping articles." The evident desire of the testator, as manifested from the language used, was to give her niece everything which pertained to her household equipment, and which would render her home life and domestic duties more comfortable and agreeable. In furtherance of this purpose, she adds to the general description of her bequest the specification of what her general description includes, namely all her "household furniture, beds and bedding, kitchen and table furnishings, books and pictures, all my wardrobe, and all other articles of personal property in the house at the time of my death, belonging to me." These specific words of enumeration which the testatrix had used, and which precede the closing portion of the bequest, could not have added anything to the scope of her bequest if she intended this last

clause to cover and pass her entire personal property. If by the language, "all other articles of personal property," she intended to embrace everything which, in the broadest legal signification of the term, could be the subject of ownership in personal property, the enumeration of household articles, house furniture, beds and bedding, kitchen and table furnishing, books, pictures and wardrobe, was entirely superfluous. These words, were we to adopt that understanding of her intention, would be meaningless and useless verbiage. If she had intended to give her niece her entire personal property in the house, in terms unrestricted, she might have easily said so without any specific enumeration.

We desire to call the court's attention to several cases, which for their value we quote more or less in full:

"Item 2: To my niece (I. H. S.) I give all my housekeeping articles, including all my household furniture, beds, bedding, kitchen and table furnishings, books and pictures, all my wardrobe, and all other articles of personal property in the house at the time of my death belonging to me: * * *

"At death left four promissory notes.

"No one for a moment will controvert the assertion of the learned counsel that the term 'personal property' in its broadest legal significance, included everything the subject of ownership aside from lands and interest in lands as goods, chattels, moneys, notes, bonds and choses in action. In its ordinary and popular use however it is oftentimes used in a more restricted sense, embracing goods and chattels only * * *. But however this may be, the evident intention of the testatrix, as disclosed by the language of the will itself, taken in connection with this term, was that she understood and used the term 'all other articles of personal property' in its restricted sense. * * * . The language of the bequest is not simply and unqualifiedly a gift of 'all her personal property.' * * * The court cannot

sever those words from other portions of the clause and give them a construction regardless of their connection with other and important qualifying words. The bequest must be construed by taking the whole sentence under consideration, and from all the language employed, and not from a disjointed portion only. * * *

"In ascertaining the real intention of a testator there is a rule applicable in the construction of wills, as well as of statutes, that where certain things are enumerated and a more general description is coupled with the enumeration that description is commonly understood to cover only things of a like kind with those enumerated. This is because it is presumed that the testator had only things of that kind in mind."

Andrews v. Schoppe et al.

"Devise to wife of 'every article of household furniture in or on said premises, including' (then follows enumerated articles) 'and every article of personal property in and about said homestead, or wherever found belonging to my estate.' Contended the bonds were included."

Held "That ejusdem generis so far as it aids in the construction of this will, forbids the construction contended for. * * * Ordinarily it limits the meaning of general words to things of the same class as those enumerated under them."

Benton v. Benton, 63 N. H. 289-295.

"This is an action brought to cover the amount of a bond in favor of the testatrix which the executor had received. The plaintiff claimed it as a legacy under the following words in the will: 'Time. I give and bequeath unto Mary Jackson, wife of William Jackson, all of my wearing apparel, household furniture, plate, linen, books and every removable whatsoever.'

"By the Court: 'We have no doubt at present. The meaning of the testatrix is plain enough. If the plaintiff's con-

struction were right, all the rest of the will would be destroyed. In this case, movable must be confined to things of the same nature with those before specified.' "

Jackson v. Vanderspreigle's Executor, 2 Dall (U. S.) 142.

"The first object is that Kosciusko did not die intestate as to his personal property in the United States and that the same passed by the second articles of the will 1817 to N. and Madam Z. Z. * * * The wills then of 1798 and of 1806 were revoked by the will of 1816 and as the testator did not make in it any disposition of his American funds, he died intestate as to them, unless the second article in the will of 1817 has the effect of a residuary bequest to the persons named in it.

"It is 'And I bequeath all of my effects, my carriage and my horse included, to Madam and to Mr. Z. Z. above named.' From its place in the will of 1817 and from the connection of the words 'all my effects with my carriage and horse included' it would be a very strained construction to make the words 'all of my effects,' comprehend his personal estate in the United States, it being neither alluded to in any way in this will nor in that of 1816. Except in so far as it might under the will of 1816 have been applied to the payment of the legacies given in that will upon the failure of the funds upon which they were first charged. Effects in French, or the word 'effects,' has the same meaning in common parlance and in law that it has in English. Its meaning properly in either, when used indefinitely in wills, but in connection with something particular and certain, is limited by its association to other things of a like kind. It is from the subject matter of its use, that intention of something else is to be implied; and that of course may be larger or less. In some instances in wills, the word has carried the whole personal estate. When in connection with words

of themselves of larger meaning, or of fixed legal import, as there were in the case of *Bosley v. Bosley*, decided at this term of the court, such a clause in a will is residuary."

Ennis v. Smith, 14 How. 400, 418, 419, 420, 421.

See also:

Dole v. Johnson, 3 Allen 364.
Bins v. Putnam, 64 N. H. 554, 15 Atl. 138-140.
Vincent v. Murray, 73 N. C. 15-20.
Farish v. Cook, 78 Mo. 212-217.
Appeal of M. L. Reakert, 173 Pa. 368.
Bond v. Martins Adm., 76 S. W. 326.
Gallagher v. McKeague, 103 N. W. 233.

Considering the surroundings and circumstances of the testatrix it is difficult to say how the rule could be more properly applied than in the case at bar. For if there ever was a case calling for the application of the rule, we respectfully submit it is this case.

SEVENTH: *The Supreme Court of the Territory of Hawaii erred in denying the motion for rehearing in said cause.*

When this cause was taken to the Territorial Supreme Court on appeal from the circuit judge, it seems to have been taken for granted that the translation of the will made by the circuit judge was a correct one and no discussion of the words of the will was had before the court. It remained for the court itself to state that the translation was "evidently defective." Briefs were filed and for some reason or other oral arguments before the Territorial Supreme Court were dispensed with.

The court handed down a decision, written by Mr. Justice Hartwell, which at any rate is extremely brief. When the petition for rehearing was filed, with the affidavits in support of the

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same, briefs were filed, and a short oral argument had, and the court was in a position to have the whole matter clearly before it.

It is respectfully submitted that this court should hold that Hikaalani Hobron Noholoa died intestate as to all her property except that at Kalaupapa, and that the Supreme Court of the Territory of Hawaii should be directed to order accordingly.

Respectfully submitted,

(Sig.) David L. Withington

" J. Alfred Magoon

" J. Lightfoot

Attorneys for Appella

Dated, Honolulu, February 4th, 1908.